IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.429 OF 2004

IN

SUIT NO.4600 OF 1997

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United Phosphorus Ltd. ...Plaintiff

v/s.

A.K. Kanoria ...Defendant

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Mr.Jayesh Karandikar i/b DSK Legal for the Plaintiff.

Mr.Milind Vasudeo with Mr.B.H. Chande i/b H.V. Chande for the Defendant in support of Notice of Motion.

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CORAM: D.K.DESHMUKH, J.

DATED: 10TH DECEMBER,2004

P.C.:

1. The original Defendant has taken out this Notice of Motion for setting aside the exparte decree passed by this court in a summary suit. In the summary suit, summons for judgment was decided by order dated 25th October, 1999. The defence of the Defendant mainly was that the cheques on the basis of which the summary suit was filed were blank cheques and therefore the suit cannot be tried as a summary suit. There were other defences also. Perusal of the order of the learned single Judge dated 25th October, 1999 passed on the summons for judgment shows that the Court did not believe the case of the Plaintiff totally. It also found that there may be some substance in the defences that were raised by the Defendant. Therefore, the Court granted conditional leave to defend the suit. Condition was that the Defendant should deposit an amount of Rs.47 lakh within a period of sixteen weeks. The amount of Rs.47 lakh that the Defendant was directed to deposit as condition for getting leave to defend the suit was not even the amount of principal that was claimed in the suit. In stead of depositing the amount and

complying with the order of the learned single Judge, the Defendant filed an appeal before the Appellate Court. The appeal was decided by the Appellate Court by order dated 13-6-2000. The Appellate Court by a reasoned order confirmed the order granting conditional leave passed by the learned single Judge. At the request of the Defendant, the Appellate Court extended the time for depositing the amount by eight weeks. The Defendant challenged the order passed by the learned single Judge and the Appellate court before the Supreme Court by filing a Special Leave petition. The Supreme Court dismissed the Special Leave Petition by following order:

> "This is not a fit case for interference.
> The Special Leave Petition is dismissed."

This order of the Supreme Court is dated 27-11-2000. Even, thereafter there were no attempts made by the Defendant to deposit the amount, which was the condition for the Defendant to get an opportunity to contest the suit. As a consequence of the failure of the Defendant to deposit the amount, the Court passed a decree by an order dated 12-2-2001. It appears from the order of the learned single Judge dated

12-2-2001 that the submissions made by the Defendant were again considered by the learned single Judge and the finding was recorded that " In view of the express provisions of the Guarantee and the obligations assumed under the Guarantee by the Defendant as guarantor, the Defendant is clearly liable." The learned single Judge also noted that the order of the learned single Judge granting conditional leave has been confirmed by the Appellate Court as also by the Supreme Court. It further appears that at that stage a request was made on behalf of the Defendant that the Defendant should be permitted to furnish a bank guarantee in stead of depositing the amount and that request was rejected by the court. It is, thereafter, that the Defendant has taken out this Notice of Motion for setting aside the decree. The motion is taken out under Order 37 Rule IV of CPC. Under that Rule, the court can set aside the decree under special circumstances. Special circumstances, according to the Defendant, are some statements made in the complaint filed by the Plaintiff in relation to some transactions in criminal court, which according to the Defendant shows discrepancy in the amount claimed in the suit as due and the amount mentioned in the criminal

complaint and a finding recorded by the criminal court that the cheques that were given were blank, as also a statement made in the affidavit in reply in those proceedings where the Defendant says that initially the cheques were blank, but they were filled in as per the directions of the company itself.

3. In my opinion, this does not constitute a special circumstance. In any case, it is clear from the order passed by the learned single Judge that the learned single Judge did not refuse to grant leave to defend obviously because the learned single Judge found that there may be some substance in the defences raised by the Defendant. Therefore, conditional leave to defend was granted to the Defendant. On depositing the amount the Defendant would have got full opportunity to contest the entire suit claim. But the Defendant did not take that opportunity which was granted to him by the Court. He sought extension of time to deposit from the Appeal Court, but did not deposit the amount. In stead he challenged the order before the Supreme Court. Even after the Supreme Court dismissed the SLP, there was no effort made to deposit the amount

by getting time extended. When the Court took up the proceedings for making a decree, request was made that in stead of depositing the amount the Defendant should be permitted to furnish the bank guarantee. This request clearly indicates that the Defendant had accepted the order granting conditional leave and only modification that the Defendant was seeking was that he should be permitted to furnish the bank guarantee in stead of depositing the amount. Even after the decree was passed, the Defendant did not pay the amount. In my opinion, taking out of this Notice of Motion by the Defendant is dishonest and amounts to abuse of process of the court. In my opinion, therefore, such tendency in the litigant has to be discouraged. Therefore, in my opinion, interest of justice will be served not only by rejecting this Notice of Motion but also by imposing exemplary costs on the Defendant.

4. Notice of Motion disposed of. Considering the amount of claim and the decree, in my opinion, it would be appropriate to direct the Defendant to pay as and by way of costs of this Notice of Motion an amount of Rs.10,000/- to the Plaintiff.

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